No. 2609

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR F. HUTTON, doing business as Hutton Machine Works,

Appellant,

vs.

BRITISH COLUMBIA MARINE RAILWAY COMPANY, LIMITED, a corporation, claimant of the Steamship "Alaskan," Her Boilers, Engines, Machinery, Boats, Apparel and Furniture,

Appellee.

Brief of Appellee

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellee.

614 Colman Bldg.,
Seattle, Wash.

Press of Pliny L. Allen, Seattle, Washington

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellee

ARGUMENT.

In this cause the libelant claimed a lien under the state statute. The trial court rejected the claim in an exhaustive opinion (Ap. 38-40). Sub-

sequently a motion for a rehearing was made and upon argument thereof proctor for libelant not only reargued his cause upon that theory, but also claimed a lien under the general admiralty law. In a second and even more exhaustive opinion the court held that libelant had no lien upon either theory. (Ap. 41-45). These opinions may well serve as our brief in this cause and it would be an imposition upon the court to wholly restate the matter therein contained. We shall therefore content ourselves with a few observations in reply to appellant's brief.

NO LIEN UNDER STATE LAW.

We do not understand that the rule of the well known *Chamberlain* case has been in any way abrogated. That case held that in order to establish the lien it was necessary to show that such was the intention of both parties to the transaction and it was not sufficient to show that the vendor so understood or that he charged the supplies to the vessel. It was, however, held that the common intent to bind the vessel need not necessarily be expressed in words, but that it might be deduced from circumstances of such a nature as to justify the inference.

The cases which appellant so much relies on as relaxing the rule of the *Chamberlain* case are in fact in strict accord with it. A common understand-

ing is still necessary, but as the *Chamberlain* case pointed out it may be found from circumstances rather than express words. Thus in *"The Bainbridge,"* 210 Fed. 620, it was found that the owners had told King and Winge who were making some of the repairs, that the boat was good for the work, and in addition had agreed that the libelants were to hold the engines until final payment. Since this could be done only by maintaining a lien upon the boat the court held that an understanding that there should be a lien would be inferred.

Again in the *F. A. Kilbourn,* 179 Fed. 107, which appellant quotes at length and largely relies upon, it appeared that through a long course of dealing extending over three and one-half years the libellant had done thirty jobs on credit of the vessel for all of which the libellant had been paid. From this long continued acquiescence the court inferred that the owner had consented that the libellant should have a lien.

It is argued that the circumstances are present here and it is important that the record on this point be understood. Hutton testified in part as follows:

"Q. Had you done work for these people before?

A. On several occasions.

Q. How had you charged on other occasions?

A. To the vessel direct.

Q. And the vessel had always been rendered to Bradford charged to the boat direct?

A. Charged to the boat, rendered to the company's office." (Ap. 36).

But appellant in an attempt to fix the lien upon another theory points out that the owner had but one boat, the "Alaskan"; and Hutton immediately after giving the above testimony further testified as follows:

"Q. Mr. Hutton, had you previously done work on this particular boat the "Alaskan"?

A. Not to my recollection." (Ap. 36).

Accordingly there had been no previous course of dealing by which the bills had always been rendered to the owner and paid. The confusion arises out of the fact that Bradford was agent for other companies. (Ap. 26). And it was clearly with these other companies that Hutton had his course of dealing through Bradford. Bradford testified very clearly that there was no agreement between him and Hutton, that these repairs should be made upon the credit of the vessel, and that nothing was said upon the subject. (Ap. 26). It must have been a great temptation to Hutton to deny this yet with commendable honesty he did not do so when called on rebuttal. (Ap. 35-36). And so the only evidence we have on the subject is his original evidence that the repairs were charged to the vessel and that he intended to hold the vessel. In appellant's brief we are taken to task for not denying

the latter statement, but how in the nature of things can one deny another's secret intention?

The fact is that the libellant's case rested upon Hutton's statement that he billed the repairs to the vessel and intended to claim a lien. Under such circumstances there was nothing for the trial judge to do other than to follow the authority of the *Chamberlain* case.

> "But in order to establish that fact it is necessary to show that such was the intention of both parties to the transaction. It is not sufficient that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account."
>
> *Alaska & P. S. S. Co. v. C. W. Chamberlain & Co.,* 116 Fed. at 602.

NO LIEN UNDER GENERAL ADMIRALTY LAW.

When the matter just discussed was being reargued on rehearing the Court became apprised of the fact that the vessel was registered at Ketchikan and was disposed to think that the libellant might have a lien under the general admiralty law. It was finally stipulated by the proctors in open court that any amendments necessary to raise the question might be considered as having been made. The Court then desired that authorities be fur-

nished on this latter phase of the case. Most of the authorities submitted are referred to in the second opinion of the Court reaffirming his former opinion that there was no lien under the state law and in addition finding that there was no lien under the general admiralty law. (Ap. 41-43).

In every case where the question has arisen it has been held that with reference to the lien law "home port" means not where the vessel is registered but where her owner resides.

The vessel in this case was registered in Ketchikan but her owner was a Washington corporation and therefore as to material men, Seattle was her home port. In view of the fact that proctor does not seem to except to this portion of the Court's ruling we do no more than cite the best considered cases on the subject.

The Albany, Vol. 1 Fed. Cas. No. 131.
St. Jago De Cuba, 9 Wheaton 409.
The Rapid Transit, 11 Fed. 323.

The court will note that the last case is on all fours with the case at bar. The vessel in that case was registered in Cincinnati, Ohio. The repairs were made in Kentucky and she belonged to a Kentucky corporation. The court held that there was no lien under the general admiralty law.

We submit that the decree of the lower court should be affirmed.

Respectfully submitted,

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,

Proctors for Appellee.